Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-160

HARRY HAMMONDS,

Petitioner,

vs.

THE STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

MICHAEL GROSS,
Attorney for Petitioner,
One Essex Street,
Hackensack, New Jersey 07601.
(201) 343-8100

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No.

HARRY HAMMONDS,

Petitioner,

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THE STATE OF NEW JERSEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Statement of the Case

The Defendant was arrested on January 30, 1973, for possession of marijuana. A timely motion was heard before the Honorable Paul R. Kramer, J.C.C. at Mount Holly, Burlington County, on March 6, 1974 and denied on March 18, 1974. Both the Defendant and the Prosecu-

tor had stipulated the testimony of the Trooper on the motion to suppress would constitute the State's case. The Defendant offered no additional testimony and was found guilty. He was sentenced to serve one year in the Burlington County jail, the service of which was stayed pending his appeal from the denial of the motion to suppress evidence, which was affirmed per curiam by the Appellate Division on March 19, 1975. A petition for a writ of certification was denied on June 12, 1975 by the Supreme Court. This petition is for a writ of certiorari on the motion to suppress evidence.

Jurisdiction

The final order of the New Jersey Supreme Court was made and entered on June 12, 1975. The jurisdiction of the Court is invoked under 28 U.S.C. 1257(3).

Question Presented for Review

Did the Defendant validly consent to the warrantless search of his trunk, thereby waiving his rights under the Fourth Amendment?

Statement of Facts

On January 30, 1973, at approximately 3:30 P.M., the petitioner was operating his vehicle in the Northbound lane of the New Jersey Turnpike at Mansfield Township. There were no other passengers in the vehicle. The petitioner was aware that his trunk was stuffed with approximately 100 pounds of marijuana, and his personal clothing. Neither was in plain view.

Trooper Joseph Pitko stopped the Petitioner for allegedly exceeding the speed limit and the petitioner pulled to the side of the road. The following exchange took place:

> "I stopped behind him and I approached the vehicle. I asked the driver for his license and registration, at which time he went through his wallet to obtain the driver's license and registration.
>
> At the time he was getting his license and registration he looked a little nervous and he started to shake visible to me.
>
> He got his license and registration. He handed it to me.
>
> I advised him that I stopped him for exceeding the speed limit and I asked him why his vehicle was sitting low in the rear. I said 'What are you carrying in the vehicle in the trunk?' He hesitated and he said, 'Clothes.'
>
> So I asked him, 'Do you mind if I take a look,' and he was still shaking. As a matter of fact, he even started to sweat a little bit on the forehead.
>
> Like I stated, I asked him, 'Do you mind if I take a look?' He hesitated and he said, 'I don't have the key.' So I asked him, 'Does the key to the ignition open the trunk, at which point he took out the key.
>
> We walked to the back of the vehicle and he placed the key into the trunk and he turned it. It didn't open. So I said, 'How about the other key?' —there were two keys on the ring. He placed that key in the trunk and he turned it and it opened it." (March 4, T4-6, T5-6).

At this time the Trooper observed three white cloth sacks containing green vegetation that appeared to be marijuana and placed the Defendant under arrest. The search of the trunk was without a warrant. There was no assertion of probable cause, nor did the Trooper claim that he was searching for weapons.

Argument for Granting the Writ

This petition raises substantial and important questions concerning the administration of criminal justice. This Court has stated that warrantless searches are per se unreasonable except in certain exceptional circumstances, such as where there is consent. *Katz* v. *United States,* 389 U. S. 347 (1967). Criteria for ascertaining consent has not been definitively set forth. Given the great danger of abuse by the police where they have not obtained a search warrant, it is incumbent that this Court address itself to the issue of the waiver of Fourth Amendment rights as it has done with the waiver of Fifth and Sixth Amendment rights. *Miranda* v. *Arizona,* 384 U. S. 436 (1966).

The Defendant in the case at bar was stopped by a New Jersey State Trooper for speeding. The Defendant, a resident of Texas, was aware that he was carrying 100 pounds of marijuana in the trunk of his car. When the Trooper asked the Defendant what he was carrying he replied, "Clothes." When the Trooper asked him, "Do you mind if I take a look?", the petitioner falsely answered, "I don't have the key." The Trooper asked Petitioner to try "the other key" on the ring. The trunk was then opened.

In *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), the Court said, "A waiver is ordinarily a relinquishing of a know

right." At no time did the Trooper warn the Defendant that he had the right to refuse to consent to the search. Nor is there any evidence on the record that the Defendant indeed know that he had the right to refuse the Trooper entry to the trunk. The only basis the trial court found for imputing knowledge to the Defendant of his rights came at the very end of Judge Kramer's opinion:

> "I further find it difficult to believe that a young man of this very obvious intelligence, from the manner in which he testified, the son of an attorney in his area, with this much (three semesters college), on a trip of that nature involving that much money did not in fact know of his constitutional right not to have the car searched against his will."

This is idle speculation. Three semesters of college is hardly a law school education. The fact that he is the son of an attorney is irrelevant, since a person cannot be expected to master the esoterics of the law simply on the basis of having a father who is trained in the law. Nor is it likely that the Defendant asked his father for legal counsel before committing the illegal act. Certainly, there is no testimony to that effect.

More significantly, though, the very question of whether the Defendant, under the law, could refuse to allow the Trooper to search the trunk was in doubt in the trial Judge's own mind.

> "I would like to direct your thinking, gentlemen, on two lines: Number One, is this United States Supreme Court case as sweeping as the newspapers and other periodicals say it is where you can search the person, an individual with a motor

vehicle offense. I think if we agree that the case really says that when we read it in its entirety, then I see little difficulty in extending it to a search of the immediate area particularly out on the Turnpike where Troopers do get shot at and have to concern themselves for their own safety." (March 4, T19)

If Judge Kramer is uncertain as to the rights in this matter, how can the Defendant be said to have knowledge of whether he had the right to refuse a gun-toting Trooper, who stops him for a traffic offense, entry into the trunk of his car?

The position of the petitioner is straightforward. For there to be meaningful consent, the Defendant must have known that he had the choice of refusing to allow the Trooper to search the car. After all, a person cannot be said to knowingly and voluntarily assent to a search when he does not know that he has the right to refuse.

The Petitioner's argument is supported by the caselaw in the area. In determining whether there was a valid consent to an otherwise unauthorized search, the Ninth Circuit Court of Appeals advised the following test:

> ". . . (T)he trial court determination that there has been an effective waiver cannot stand unless there is implicit therein a finding of fact that, under the described circumstances, the words used by Smith reflected (1) an understanding, (2) uncoerced, and (3) unequivocal election to grant the officers a license which (4) Smith knew may be freely and effectively withheld." *Schoepflin* v. *United States,* 391 F. 2d 390, 398 (1968). See also *United States* v. *Blalock,* 255 F. Supp. 268 (1966).

And in *Wren* v. *United States,* 352 F. 2d 617, at 618, the Court announced similar requirements:

> "In order to constitute a voluntary consent it must appear that the search was voluntarily permitted or expressly invited and agreed to by the person whose right is involved. In addition, such person must be cognizant of his rights in the premises, the consent must not be contaminated by duress or coercion and the government has the burden of proof. . . ."

Should this Court find that knowledge is not a necessary element of informed consent, it has long been established that there is no consent unless it is "free and voluntary and not a mere acquiescence to authority." *Bumper* v. *North Carolina,* 391 U. S. 543 (1968). See also, *Wren* v. *United States,* supra. Implicit in the very nature of the term "consent" is the requirement of voluntariness. To be voluntary the consent must be "unequivocal and specific" and "freely and intelligently given." *Judd* v. *United States,* 190 F. 2d 649, 651 (1951). The burden to make such a showing by clear and convincing testimony is on the state. *Wren* v. *United States,* supra, *State* v. *King,* 44 N. J. 346, 352 (1965).

The leading case on this question in New Jersey is *State* v. *King,* supra. The Court enumerates the following factors tending to establish voluntary consent:

1. Consent was given when the accused had reason to believe that the police would find no contraband.
2. Defendant admitted guilt before consent.
3. Defendant affirmatively assisted the police.

None of these factors is present in the instant case.

1. Petitioner knew the contraband was in the trunk (March 4, T7-22, 24);

> "Q. Were you aware that time that your vehicle, that the truck contained contraband? A. Yes."

2. Petitioner denied the trunk contained contraband before the search (March 4, T4-16 to 18).

> "'What are you carrying in the vehicle in the trunk?' He hesitated and he said, 'Clothes.'"

3. Petitioner made positive effort to stop the search by denying he possessed a key (March 4, T4-22 to 24);

> "Like I stated, I asked him, 'Do you mind if I take a look?' He hesitated and he said, 'I don't have the key.'"

It was only on the demand of the Trooper that the Defendant tried the key that was in the ignition, knowing full-well that it would not open the trunk. And it was only because the Trooper pursued the matter when he said, "How about the other key," that the Petitioner got the key which opened the trunk.

It is apparent that if the Petitioner was freely and voluntarily consenting to said search and not merely acquiescing to authority, he would have gotten the correct key to begin with rather than deny he had the key with him, and then try the wrong one before he finally opened the trunk at the Trooper's prodding.

The Court in *King* goes on to list those factors which tend to show coercion:

1. Consent was made by an individual already arrested.
2. Consent was obtained despite a denial of guilt.

3. Consent was made only after accused had refused initial requests for consent to search.
4. Consent was given when subsequent search resulted in a seizure of contraband the accused must have known would be discovered.
5. Consent was given when the defendant was handcuffed.

In the instant case, (1) the defendant was stopped for speeding; (2) he denied he was carrying any contraband when questioned by the Trooper; (3) he refused the Trooper's request to search by denying he possessed a key; (4) the trunk was stuffed with overflowing sacks of smelly vegetation which could not have been overlooked (March 4, T5-7 to 12 and T12-14 to 16), but Defendant was not handcuffed until immediately after the trunk was opened.

Furthermore, it is admitted by the Trooper in testimony that the Petitioner appeared "nervous", "sweating", "shaking visibly" (March 4, T4). As the accused stated, he was under "the impression that if I did not open the trunk of the car I was dead" (March 4, T13-2 to 3).

The trial court had relied upon *Scheckloth* v. *Bustamonte,* 412 U. S. 218 (1973). *Schneckloth* is inapposite since in that case the officer asked the owner if he could search the car and the owner replied, "Sure, go ahead." That is hardly the case here.

The aforementioned facts make up a clear picture that the accused did not freely and intelligently consent to a search of his trunk. Nowhere is there evidence that the petitioner agreed to the search. Rather, his nervous behavior and denial that he had the key manifests his intention to thwart the search. It was only through the persistence of the Trooper's demands that the accused finally acquiesced.

In light of the Court's strong presumption against waiver of constitutional rights when Fifth and Sixth Amendment rights are involved, and its requirement that a suspect be informed of his rights before he can consent to a waiver, *Miranda* v. *Arizona,* supra, we can see no reason for treating the relinquishment of Fourth Amendment rights in a different manner.

Given the inherent power of a gun-carrying Trooper vis-a-vis a suspect, petitioner believes that a police officer should be required to warn a suspect of his rights under the Fourth Amendment before a waiver can ensue. Not only would this make consent knowledgeable, but it would ensure that any subsequent waiver was voluntary rather than the natural result of a police officer's power in such situations. This policy would also clear up the ambiguities that have resulted in cases involving alleged consent.

Thus, in *United States* v. *Blalock,* supra, one of the agents asked the defendant whether, since he claimed he was not involved in the robbery, he would mind if they searched his room. Defendant replied that he had no objection. It was during the search that the incriminating evidence was found.

The Court, in granting defendant's motion to suppress, stated, "The agents here properly warned defendant of his right to counsel and his right to remain silent, but they did not warn him of his right to refuse a warrantless search. The Fourth Amendment requires no less knowing a waiver than do the Fifth and Sixth. The requirement of knowledge in each serves the same purpose, i.e., to prevent the possibility that the ignorant may surrender their rights more readily than the shrewd."

In the case at bar, the defendant was never informed of his rights, nor is there any evidence that he knew what

his rights were. Unlike *Blalock,* there was nothing voluntary about his consent. For the reasons stated, the denial of the motion to suppress should be reversed.

CONCLUSION

It is urged that there were no grounds for the search of the petitioner's vehicle and his motion to suppress should have been granted.

Respectfully submitted,

MICHAEL GROSS,
Attorney for Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

Per Curiam Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—March 19, 1975.)

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION—DOCKET NO. A-3107-73

THE STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

HARRY HAMMONDS,

Defendant-Appellant.

Submitted March 10, 1975—Decided March 19, 1975.

Before Judges LEONARD, SEIDMAN and BISCHOFF.

On appeal from Superior Court, Law Division, Burlington County.

Mr. Michael Gross, attorney for appellant.

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondent (Mr. Solomon Rosengarten, Deputy Attorney General, of counsel and on the brief).

PER CURIAM

Appendix A

We affirm the order denying defendant's motion to suppress evidence essentially for the reasons stated by Judge Kramer in his oral opinion.

APPENDIX B

Order of the Supreme Court of New Jersey Denying Petition for Certification

(Filed—June 12, 1975)

SUPREME COURT OF NEW JERSEY
C-555 SEPTEMBER TERM 1974

THE STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

HARRY HAMMONDS,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 12th day of June, 1975.

FLORENCE R. PESHOE
Clerk

APPENDIX C

Oral Opinion of Judge Kramer

SUPERIOR COURT, NEW JERSEY, LAW DIVISION,
BURLINGTON COUNTY

THE STATE OF NEW JERSEY

Plaintiff,

vs.

HARRY HAMMONDS,

Defendant.

Mr. Sullivan: Your Honor, can I make a recital for the record?

The Court: Surely.

Mr. Sullivan: Your Honor, this is the case of the State of New Jersey versus Harry Hammonds, Indictment number 481-72, charging possession of and possession with the intent to distribute marijuana. Your Honor heard a motion to suppress on March 6, 1974, wherein the State presented the testimony of the arresting officer, Trooper Pitko, as to the circumstances of the arrest, and the defense presented the testimony of the Defendant, Harry Hammonds, Jr., with regard to the defense version of the facts. Your Honor reserved decision in order to inquire into the legal background of the case, and at this time I believe your Honor intends to announce the decision.

Appendix C

The Court: Anything further?

Mr. Queenan: No. I have nothing further.

The Court: Well, gentlemen, I'm glad that we reserved decision on the matter so that I could have your additional help by way of a further letter memorandum on the authorities.

The fact of the matter is that since we argued the case there has been brought to my attention the case of *Schneckloth* v. *Bustamonte,* a United States Supreme Court decision, 412 U. S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854, that case decided in 1973, the opinion by Justice Stewart. Gentlemen, it answers flatly and unequivocally the argument as to whether or not for a consentual search, where the police officer asks the driver of the car, the owner or the operator of the car, if he may search the car, whether or not the police officer must give a Fourth Amendment warning analogous to a First Amendment Miranda Warning. This very recent United States Supreme Court case says the officer does not have to give that warning.

The very applicable quote from the *Schneckloth* decision is: "Our decision today is a narrow one. We hold only that when a subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."

This is, if anything, an extension of our own Supreme Court decision, *State* v. *King,* which is 44 N. J. 346. There the Appellate Division had reversed the trial court and held that in that case, because of the trial court's ability to observe the witnesses, that it was in a better position to establish voluntariness from all of the facts than an upper court with a cold record. Now, the facts in that case were quite a bit more extreme than this. In that case the defendant was accused of armed robbery. They went to his apartment in the middle of the night or around midnight, got him out of the apartment, took him on his way to the police station, one police officer in the front, one police officer in the back; and according to the police they asked him on the way to the station if they could search the apartment. He said, "All right," and they turned around and went back and searched the apartment thereafter.

Now, the facts in the *Schneckloth* case are more analogous to our case. There the police officer stops in Sunnyvale, California, a car at 2:40 in the morning because of a motor vehicle violation. One of the six men in the car seated in the back seat, told the officer it was his brother's car after no one else was able to furnish driver's license or any identification. Supposedly the officer asked Alcala—that is the man in the back who was the brother of the car owner—if he could search the car. Alcala replied, "Sure, go ahead."

All right. Gentlemen, I must respectfully deny the motion to suppress. I find as fact the following: That it was 3:30 in the afternoon on January 30, 1973; that the Defendant was travelling northbound on the New Jersey Turnpike; the officer's testimony, which I find to be credible, was that the Defendant was visibly nervous when

asked to produce his license and registration; that his hands were shaking; that the vehicle was low in the rear and that the officer commented about that to the man. Apparently there was no question about this, because the Defendant, himself, said, when the police officer asked, "Why is your car riding low in the rear?" the Defendant said, "There's no reason for it to be riding low."

I find that the trooper ordered the Defendant from the vehicle, but I do not find that he was in custody or under arrest at the time. I find that there was a detainer, certainly, at that time, but it had not risen to the level of an arrest, a custody situation. More specifically, I find that this police officer did put the words in the form of a question; that he did say, "Do you mind if I take a look?" or something to that effect.

I find that the Defendant said that he had no key. I find that the police officer did say, "Try your ignition key"; that the Defendant tried it and it didn't work; that the police officer then suggested that he try the other key, and the trunk did open, at which time the police officer saw the packets of marijuana amounting to some hundred or hundred twenty-five pounds or thereabouts.

I find that the Defendant is 29 years of age with some college, some three semesters of college; he was on his way from Texas to New York and Vermont with this large quantity of marijuana. I find that it was a voluntary search, based on the finding that I've already announced. I further find it difficult to believe that a young man of this very obvious intelligence, from the manner in which he testified, the son on an attorney in his area, with this much college, on a trip of that nature involving that much money in contraband, did not in fact know of his consti-

tutional right not to have the car searched against his will.

So, for those reasons, gentlemen, I must deny the motion in this case.

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On Petition for Writ of Certiorari to the Superior Court of New Jersey, Appellate Division

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondent
State of New Jersey
State House Annex
Trenton, New Jersey 08625

SOLOMON ROSENGARTEN
Deputy Attorney General
Division of Criminal Justice
7 Glenwood Avenue
East Orange, New Jersey 07017
Of Counsel and on the Brief

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counter-Statement of Matter Involved

Pursuant to Supreme Court Rule 40-3, respondent, State of New Jersey, respectfully submits the following additions and corrections to petitioner's statement of the case.

Petitioner, Harry Hammonds, was charged, by the Burlington County Grand Jury, with possession of marijuana and possession of the same substance with intent to distribute. On March 4, 1974, petitioner moved, before the Hon. Paul R. Kramer, in the Burlington County Court, to suppress evidence seized as a result of a search of his automobile by State Police Trooper Joseph Pitko. The court denied the motion. On March 18, 1974, Hammonds was found guilty of possessing marijuana with intent to distribute and was sentenced to four months in the Burlington County jail and fined $2,500.

Petitioner appealed his conviction to the Superior Court of New Jersey, Appellate Division. Hammonds asserted that the narcotics which had been seized by Trooper Pitko should have been suppressed as it was the product of an illegal search. On March 10, 1974, the Appellate Division, in an unpublished opinion, rejected petitioner's argument and affirmed his conviction. Petitioner then petitioned the New Jersey Supreme Court for certification. Certification was denied on June 12, 1975.

At the hearing on the motion to suppress evidence, the State's witness was New Jersey State Trooper Joseph Pitko. He testified that on January 30, 1973, he was on routine patrol on the New Jersey Turnpike. At approximately 3:30 P.M. he observed a green Ford proceeding at ninety miles per hour (T2-17 to 3-18).* The Trooper stopped the vehicle and asked the driver, whom he identified as defendant, for his license and registration. Defendant produced the requested documents. The officer noticed that defendant "looked a little nervous and started to shake" when he looked through his wallet for his license and registration (T4-2 to 13).

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*"T" refers to transcript of proceeding of March 4, 1974.

The officer had observed that Hammonds' automobile was "sitting low in the rear" and he asked defendant what he had in the trunk. Defendant's response was, "Clothes." (T4-14 to 18). The Trooper then asked defendant, "Do you mind if I take a look" (T4-19). Defendant, who was still "shaking and had begun to sweat", stated, "I don't have the key" (T4-20 to 22). The officer then inquired "Does the key to the ignition open the trunk?" In response to the inquiry, the accused removed the keys from the ignition (T4-22 to 5-1) and inserted one of them in the trunk. It failed to unlock the trunk. Pitko then asked, "How about the other key?" Defendant utilized the other key, and it unlocked the trunk (T5-2 to 6).

The officer observed that the trunk contained three white cloth sacks and green vegetation which appeared to be marijuana (T5-7 to 12). Hammonds was arrested and Trooper Pitko transported defendant and the marijuana to the State Police Barracks in Moorestown (T5-13 to 17).

Defendant's version of the incident differed in some respects from the testimony given by Pitko. Hammonds testified that after he produced his license and registration, the officer asked him why his "trunk [was] riding low" (T9-1 to 2). Defendant stated that there was no reason "for the trunk to be riding low." (T9-2 to 4). Pitko then commanded, "Well, let's take a look" (T9-5 to 8). The Trooper asked him whether he had marijuana in the trunk of his automobile, and Hammonds responded in the negative (T9-9 to 12). Defendant told the officer that there was no reason to look in the trunk and the officer repeated "Let's take a look in the trunk of your car." (T9-16 to 19). The accused stated that he did not have a key to the trunk. The officer then placed his head

inside the car, pointed to a key on a key chain and said, "Let's try this." (T9-22 to 25). Defendant then took the key and unlocked the trunk of the automobile (T10-2 to 7). Hammonds also stated that he had not been told that he had a right to refuse to open the trunk (T10-8 to 10). Finally, he stated that he had gone through three semesters at the University of Texas (T10-21 to 24).

The Court denied the motion to suppress (Ta6-24 to 25).* Defendant then waived a jury trial and stipulated the testimony given at the motion to suppress as the testimony which would be presented at a trial (Ta7-3 to 10). Defendant also stipulated that the substance which Pitko took from defendant's automobile was found by the police laboratory to be 8.8 grams of hashish and 9.3 pounds of cannabis sativa (Ta10-1 to 10; Ta13-15 to 14-4). Based on the stipulation, the Court found defendant guilty of possessing marijuana with intent to distribute (Ta14-12 to 23).

Reasons for Denying Certiorari

It is petitioner's contention that the evidence seized from his automobile should have been suppressed because it was seized illegally. Petitioner argues that his apparent consent to the search was involuntary and he asks this Court to determine whether he validly consented to the search of his automobile.

Respondent respectfully submits that petitioner fails to allege any "special and important reasons" to support his petition for review on *certiorari,* Supreme Court Rule 19. The New Jersey courts have not decided "a federal question of substance not heretofore decided by this Court." *Id.* Nor does petitioner sustain his arguments by showing that the New Jersey courts have decided the matter at hand in disaccord with applicable decisions of this Court. *Id.*

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* "Ta" refers to transcript of proceeding of March 18, 1974.

The issue raised by petitioner has been decided by this Court on several occasions. There is no question as to the constitutional standard to be met before a consent to a search will be considered voluntary. The prosecutor has the burden of proving that the consent was, in fact, freely and voluntarily given. *Bumper* v. *North Carolina,* 391 U.S. 543, 548 (1968). In determining whether a defendant's consent to a search is voluntary, a court must asssess the "totality of the surrounding circumstances . . ." *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 226 (1973). In examining the surrounding circumstances to determine if the consent to the search was coerced "account must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *Schneckloth* v. *Bustamonte, supra* at 229. Furthermore, a showing of no more than mere acquiescence to authority does not constitute consent. *Bumper* v. *North Carolina, supra* at 548-549.

Furthermore, the decisions of the courts of this State are in accord with the applicable pronouncements of this Court. The leading decision in New Jersey on consent searches, and the case adhered to by the courts in the case *sub judice, is State* v. *King,* 44 N.J. 356, 209 A.2d 110 (1965). There, the New Jersey Supreme Court set forth various factors that must be weighed in determining whether consent to a search has been given voluntarily.

Among those factors which courts have considered as tending to show that the consent was coerced are: (1) that

consent was made by an individual already arrested; (2) that consent was obtained despite a denial of guilt; (3) that consent was obtained only after the accused had refused initial requests for consent to search; (4) that consent was given where the subsequent search resulted in a seizure of contraband which the accused must have known would be discovered; (5) that consent was given while the defendant was handcuffed.

Among those factors which courts have considered as tending to show the voluntariness of the consent are: (1) that consent was given where the accused had reason to believe that the police would find no contraband; (2) that the defendant admitted his guilt before consent; and (3) that the defendant affirmatively assisted the police officers. An examination of the facts of a particular case in light of the criterion set forth in *State* v. *King, supra,* will determine, consistently with this Court's pronouncements in *Schneckloth* v. *Bustamonte, supra,* and *Bumper* v. *North Carolina, supra,* whether consent to a search has been given voluntarily.

In the instant case, the New Jersey courts applied the proper standard and determined that petitioner's consent to the search of his automobile was voluntary. Given the facts in the instant matter, there can be no serious dispute with the finding of this State's courts. In the instant case, we initially find a State Trooper confronting an individual who is accused of speeding. This fact alone does not transform an otherwise non-coercive situation into one that overcomes the will of the accused. Were it considered otherwise, consensual searches could almost never take place because, invariably, the situation in which consent to a search is given involves a confrontation between a law enforcement officer and a person who is in some way the subject of official police inquiry. To hold

that consent cannot be given for a search under such circumstances would be to place such artificial restrictions upon consensual searches as to jeopardize their basic validity.

Furthermore, the fact that the officer was armed does not create a coercive atmosphere out of a inherently non-coercive situation. All policemen are armed when they stop vehicles for traffic violations. Petitioner was neither arrested nor taken into custody. Custody involves deprivation of freedom in a significant way. See *Miranda* v. *Arizona,* 384 U.S. 436 (1966). The facts clearly show that the situation in which petitioner found himself was not such as to be conducive to coercion. Moreover, courts have found voluntary consent to search even in situations where defendants had been arrested or were otherwise in custody. Annotation, *Search—Consent While In Custody,* 9 A.L.R.3d 858, 873 and 880 (1966).

After petitioner was stopped, he produced his license and registration at the request of the trooper. The latter then advised him that he had been stopped for exceeding the speed limit. What occurred immediately thereafter was the subject of conflicting testimony. The trial court resolved this question of credibility in favor of the police officer and the Appellate Division concurred in this finding. It is not the function of this Court to act as a finder of fact and review findings of fact made below. Moreover, the trooper's testimony was credible, and the State courts had every reason to believe his testimony.

The officer testified that he asked petitioner what he was carrying in the trunk of his automobile. The accused's response was "clothes" (T4-16 to 18). The officer then asked Hammonds, "Do you mind if I take a

look." (T4-19 to 22). Petitioner responded to the trooper's question by stating that he did not possess the key (T4-23 to 24). The officer then asked him if the key to the ignition opened the trunk (T4-24 to 25). Hammonds then removed the ignition key and inserted it in the trunk. When it failed to unlock the trunk, Trooper Pitko asked defendant if "the other key" might open it. The accused then placed that key in the trunk and unlocked it, revealing the presence of marijuana (T4-24 to 5-20). The foregoing facts are not suggestive of a coercive atmosphere. Trooper Pitko's initial question was merely a request. No reasonable person would have considered it to be a directive to open the trunk. The subsequent conversation did not convert the non-coercive situation into one where petitioner was compelled to act against his will. Petitioner's contention that the search was solely the result of the tropper's demands is not borne out by the facts. The officer never demanded Hammonds' acquiescence to his request to search. Each of Trooper Pitko's remarks was in response to petitioner's remarks or action and did not represent attempts to obtain petitioner's consent by an excessive display of authority. When Hammonds told the trooper that he did not have the key to the trunk, he did not manifest to the officer his unwillingness to consent. On the contrary, Hammonds' remark appeared to imply that the only impediment to a search of his trunk was the fact that he lacked the key. Consequently, Trooper Pitko, who had not received a negative response to his request for permission to view the inside of the vehicle's trunk, inquired as to whether the ignition key unlocked the trunk. This question did not evidence an attitude of persistence, but was a reasonable response to petitioner's statement. Hammonds could have stated that the key to the ignition did

not unlock the trunk. Similarly, when the key with which defendant attempted to open the trunk failed to do so, the patrolman suggested that it may be the wrong key. Again, as in the case with the trooper's prior remark, the suggestion that petitioner utilize another key to unlock the trunk cannot be seen as the officer's insistence that Hammonds consent to a search, despite the latter's unwillingness to do so. The trooper's statement was merely a response to the situation. Since petitioner never indicated to the officer that he did not wish to consent, the officer cannot be said to have persistently demanded that defendant consent to a search.

Logically, persistent demands would follow a refusal to adhere to an initial request or demand. Moreover, any reasonable person in Hammond's position would not have seen the officer's remarks as demands that he acquiesce in the trooper's desire to conduct a search. Petitioner knew that he had not given the officer a negative response to his request to look in the trunk. Furthermore, it must have been apparent to Hammonds that Pitko's responses to his remark and conduct were natural under the circumstances and could not be classified as attempts to be overbearing.

Further evidence that the police officer was not overbearing can be seen from his behavior. At no point did he do anything to open the trunk. This clearly showed petitioner that Pitko neither had the authority to conduct a search nor intended to search Hammonds' vehicle without the latter's consent. Under these circumstances, petitioner's action in unlocking the trunk of his automobile could not have been mere acquiescence to authority.

While Hammonds' denial that he had a key and his initial insertion of the wrong key may have indicated that

defendant was reluctant to permit a search of his automobile, such initial hesitation does not mean that he could not have consented after reflecting on the matter. It is to be expected that an individual who is knowingly in possession of contraband would not be inclined to permit a police search.* If a person consents to a search requested by the police under such circumstances, he probably does so in the hope that the appearance of cooperation will dissuade the law enforcement officer from conducting a search. Or, he may believe that the incriminating article will not be found or will not be recognized as such by the law officer. As the Court stated in *United States* v. *Katz,* 238 F.Supp. 689, 695 (S. D. N. Y. 1965):

> "It cannot be gainsaid that people detained by police often assume it to be advantageous to be completely cooperative, usually, no doubt, with the hope that such conduct in the long run will be the best route out of their predicament."

Petitioner's seeming reluctance in the instance case may have been only a means of delaying his ultimate decision until he could reflect as to his alternatives. Alternatively, it is possible that Hammonds' initial decision not to consent to a search may have given way to a change in strategy and a belief that it would be in his interest to cooperate with the officer. Many courts have held that a defendant's initial refusal to permit a search will not vitiate his subsequent consent. See, *e.g. People* v. *Garcia,*

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*"A person need not have a positive desire that a search be conducted in order for his consent to have been voluntary and effective." *United States* v. *Thompson,* 356 F.2d 216, 220 (2nd Cir. 1965).

227 Cal.App. 2d 345, 38 Cal. Rptr. 670 (Dist.Ct.App. 1964); *People* v. *Ely,* 220 Cal.App. 2d 451, 33 Cal.Rptr. 725 Dist.Ct.App. 1963); *People* v. *Ross,* 206 Cal.App. 2d 542, 24 Cal.Rptr. 1 (Dist. Ct. App. 1962); ***State* v. *Hauser,*** 257 N.C. 158, 125 S.E.2d 389 (Sup.Ct. 1962).

Similarly, courts have held consents to searches to be valid even though the defendants attempted to evade the police when first approached by law enforcement officers. ***People* v. *Randal,*** 226 Cal.App.2d 105, 37 Cal.Rptr. 809 (Dist.Ct.App.1964); *People* v. *Williams,* 148 Cal.App. 2d 525, 307 P.2d 48 (Dist.Ct.App.1957); *People* v. *Garnett,* 148 Cal.App.2d 280, 306 P.2d 571 (Dist.Ct.App. 1957); *Longo* v. *State,* 157 Fla. 668, 26 So.2d 818 (Sup.Ct. 1967).

The circumstances surrounding petitioner's consent to the search in the instant case reveal that Hammonds' will was not overcome and that he was not deprived of an opportunity to make an effective choice as to his alternatives. Nor do we have acquiescence to a claim of lawful authority.

Courts have held that a defendant's apparent consent is not voluntary when he is confronted with police officers under circumstances which are so overbearing as to compel him to consent to a search even though he does not want to do so. See, e.g., *United States* v. *Mapp,* 476 F.2d 67 (2nd Cir. 1973); *United States* v. *Wilcox,* 357 F.Supp. 514 (E.D.Pa. 1973); *People* v. *McKelvey,* 23 Cal. App. 3d 1027, 100 Cal.Rptr. 661 (Dist.Ct.App.1972); *People* v. *Cedeno,* 218 Cal.App.2d 213, 32 Cal.Rptr. 246 (Dist. Ct.App.1963); *Earman* v. *State,* 265 So.2d 695 (Fla. Sup. Ct.1972); *People* v. *McGurn,* 341 Ill.2d 632, 173 N.E. 754 (1930); *Marple* v. *State,* 51 Okla. Crim. 240, 1 P.2d 836 (Crim.Ct.App.1931).

The factors which led the courts in the above cases to disallow the searches are not present in the instant case. Unlike the defendants' confrontations with police in those cases, petitioner was not confronted with a display of force or threats, or any other action by Trooper Pitko which would compel him to consent to a search when he would not have done so otherwise.

In other cases, courts have held that consent to searches given by defendants who are led to believe that the police will conduct a search irrespective of their wishes are invalid. See, e.g. *United States* v. *Villano,* 310 F.2d 860 (10th Cir. 1962); *People* v. *Kaigler,* 368 Mich. 281, 118 N.W.2d 406 (Sup.Ct.1962); *Thurlow* v. *State,* 406 P. 2d 918 (Nev.Sup.Ct.1965); *Barnes* v. *State,* 25 Wis.2d 116, 130 N.W.2d 264 (Sup.Ct.1964). In the instant case, Trooper Pitko did not tell or even suggest to petitioner that he would conduct a search if Hammonds did not consent. Rather, he merely requested Hammonds' permission to search.

Voluntary consent has also been found lacking when the police have conducted a search or illegally intruded on the privacy of a defendant or his property prior to asking him for consent to search. Under such circumstances, the defendant is likely to believe that since the police have already conducted a search without his acquiescence, they would probably do so again. Consent given under such circumstances shows only that the accused is resigned to the inevitable search. See, e.g. *United States* v. *Lewis,* 274 F.Supp. 184 (S.D.N.Y. 1967); *People* v. *Zazzetta,* 27 Ill.2d 302, 189 N.E.2d 260 (Sup.Ct. 1963); *People* v. *Porter,* 37 Misc.2d 73, 236 N.Y.S. 2d 162 (Sup. Ct.1962); *Mullins* v. *State,* 75 Okla.Crim. 417, 133 P.2d 239 (Okla.Ct.Crim.App.1943). In the instant case, Trooper Pitko did not intrude on defendant's person or his automobile in any manner whatsoever.

Courts have also held that mere acquiescence to a claim of lawful authority does not constitute voluntary consent. Thus, in *Bumper* v. *North Carolina, supra,* this Court held that consent to a search given by defendant's grandmother, who owned the house searched, was not a valid waiver of her Fourth Amendment rights, because one of the officers who conducted the search falsely claimed that he had a search warrant. In a case comparable to *Bumper,* the Court in *Newman* v. *United States,* 277 F.2d 794 (5th Cir. 1960), held that the defendant had not validly consented to have his records examined by the Internal Revenue Service when he agreed to give up his records after an I.R.S. agent asserted that he had a right to take and examine them. See also *State ex rel. Lewis* v. *Warth,* 131 W.Va. 437, 48 S.E.2d 6 (Sup.Ct. 1948). The case sub judice is totally different from the foregoing cases, as the trooper did not even hint that he had the authority to conduct a search.

The fact that defendant knew that he possessed contraband in the trunk of his automobile does not mean that he did not voluntarily consent to a search. As pointed out earlier, a defendant in possession of evidence that he committed a crime may believe that cooperation is in his best interest. That is why courts have consistently upheld searches based on consent even though defendants knew that contraband would be found and at the same time claimed innocence. See, *e.g., State* v. *McNair,* 59 N.J.Super. 453, 158 A.2d 7 (App.Div. 1960), *cert.* den. 365 U.S. 829 (1969); *Gendron* v. *United States,* 227 F. Supp. 182 (D.Mo. 1964), petition to vacate sentence dismissed, 340 F.2d 601 (8th Cir.1964); *People* v. *Sanchez,* 191 Cal.App.2d 783, 12 Cal.Rptr. 906 (1961); *People* v. *Bennett,* 208 Cal.App.2d 317, 25 Cal.Rptr. 257 (1962); *People* v. *Amiotte,* 215 Cal.App.2d 176, 30 Cal.Rptr. 102

(1963), *cert.* denied 375 U.S. 987; *United States* v. *Katz,* 238 F.Supp. 689 (S.D.N.Y. 1965); *People* v. *King,* 175 Cal. App.2d 386, 346 P.2d 235 (1959); *Kershner* v. *Boles,* 212 F.Supp. 9 (D.W.Va.1963), modified on other grounds, 320 F.2d 284 (4th Cir. 1963); *People* v. *Albino,* 184 Cal. App.2d 84, 7 Cal.Rptr. 246 (1960); *People* v. *Bradley,* 243 Mich. 609, 220 N.W. 788 (1928); *State* v. *Plas,* 391 P.2d 867 (Nev.1964); *State* v. *McPlak,* 243 N.C. 243, 90 S.E.2d 501, *cert.* denied 351 U.S. 919; *State* v. *Barron,* 238 Ore. 527, 395 P.2d 158 (1964), *cert.* denied 380 U.S. 920 (1964).

One other factor which leads to the conclusion that petitioner's consent to the search was voluntarily given is the assistance which Hammonds gave Trooper Pitko in conducting the search. It was petitioner, and not the trooper, who voluntarily opened the car trunk, revealing the presence of marijuana. There can hardly be better evidence of voluntariness than that which shows that the defendant assisted in the search. Such assistance has been held, by many courts, to clearly indicate the voluntary nature of defendant's consent. See, *e.g. United States* v. *Katz, supra; People* v. *Bracamonte,* 194 Cal.App.2d 167, 15 Cal.Rptr. 54 (Dist.Ct.App.1961); *Dickerson* v. *People,* 499 P.2d 1196 (Colo.Sup.Ct.1972); *James* v. *State,* 223 So.2d 52 (Fla.Dist.Ct.App.1969); *Batch* v. *State,* 208 So.2d 846 (Fla.Dist.Ct.App.1968); *Reynolds* v. *Commonwealth,* 273 S.W.2d 89 (Ky.Ct.App.1954); *State* v. *Suchy,* 31 OhioMisc. 265, 58 Ohio Ops.2d 376, 277 N.E.2d 459 (Ct. Common Pleas 1971); *Sims* v. *State,* 73 Okla.Crim. 321, 121 P.2d 317 (Crim.Ct.App.1942); *State* v. *Barron, supra; State* v. *Thomas,* 78 S.D. 568, 105 N.W.2d 549 (Sup.Ct.1960); *Lee* v. *State,* 164 Tex.Crim. 106, 296 S.W. 2d 782 (Crim.Ct.App.1956); *Stewart* v. *State,* 244 S.W. 2d 688 (Tex.Civ.App.1951).

Finally, it is significant that petitioner is not an uninformed person. He attended college for three semesters and the court found, from the manner in which he testified, that he was a man of "very obvious intelligence" (Ta6-16 to 18). Clearly, Hammonds' testimony demonstrated that he was intelligent and informed. This fact, and his educational background, clearly indicate that he acted knowingly and voluntarily when he consented to the search.

Given the foregoing, it is clear that the law of consent searches, as set forth by this Court, is clear and that the courts of New Jersey have applied the standards set forth by this Court in determining whether the search in the case at bar was valid. Moreover, this State's courts' examinations of the totality of the circumstances underlying the search in the instant cases is in accord with the manner in which courts throughout the country have approached this matter. In fact, petitioner does not contest the immediately foregoing. Rather, he asks this Court to undertake a review of the facts of this case to determine if the search was valid. Clearly, such is not the function of this Court.

CONCLUSION

It is respectfully submitted that the petitioner has failed to substantiate any claim of constitutional error in the New Jersey courts. He asks this Court to examine the facts of this case to determine whether the findings of the New Jersey courts is supported by the evidence. Clearly, it is not the function of this Court to undertake such a duty. Therefore, respondent, State of New Jersey, respectfully prays that the writ of certiorari sought in the above named petition before this Court not issue.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of New Jersey
Attorney for Respondent
By: SOLOMON ROSENGARTEN
Deputy Attorney General

SOLOMON ROSENGARTEN
Deputy Attorney General
Division of Criminal Justice
Of Counsel and on the Brief